

Docket No. 248,382

This is a claim for a June 7, 1999, accident resulting in a right upper extremity injury. Respondent agrees this is a compensable claim and claimant is entitled to benefits.

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This is a claim for injuries to claimant's bilateral upper extremities caused by claimant's regular work activities each and every day through his last day worked of September 2, 1999. Respondent contends claimant failed to prove his bilateral carpal tunnel syndrome condition was related to his employment and further claimant failed to provide respondent with timely notice of the work-related accident.

In contrast, claimant requests the Appeals Board to affirm the preliminary hearing Order.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the preliminary hearing record and considering the arguments of the parties, the Appeals Board concludes the preliminary hearing Order should be affirmed.

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Claimant established through his testimony that he twisted his left ankle as he was running up some flights of stairs at work on March 21, 1999. The next day claimant could not walk on the injured ankle. He notified the respondent of an ankle injury, took a vacation day, and went on his own to a local physician's office. Claimant was seen by a physician's assistant who referred claimant to orthopedic surgeon David O. King, D.O.

Dr. King's medical records were admitted into evidence and indicate that the doctor saw claimant on one occasion, March 24, 1999. He diagnosed claimant with a sprain to the left ankle and subtalar joint caused when claimant twisted the ankle climbing stairs at work. Claimant's medical history related a bilateral foot problem that was corrected by surgery when claimant was a child. There is no evidence from Dr. King's examination that claimant's preexisting foot problems caused this left ankle sprain. Dr. King recommended claimant wrap the ankle and prescribed medication in the form of muscle relaxers.

As claimant continued to work, his left ankle sprain remained symptomatic. He attempted to return to Dr. King for treatment in August of 1999, but the respondent's insurance carrier notified Dr. King and claimant it would not pay for any further treatment for claimant's left ankle sprain.

At the suggestion of the company physician's, Ambrosio P. Mendiola, M.D., claimant eventually came under the treatment of orthopedic surgeon Michael P. Estivo, D.O., for his

left ankle sprain. Dr. Estivo saw claimant for the first time on August 25, 1999. He placed claimant's left ankle in an air cast splint and prescribed anti-inflammatory medication.

The Appeals Board finds based on claimant's testimony and the medical records admitted into evidence at the preliminary hearing that claimant has proved his left ankle injury was the result of a March 21, 1999, accident directly related to his employment with the respondent.

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Claimant injured his right upper extremity in a fall at work on June 7, 1999. Respondent agrees claimant injured his right upper extremity in the June 7, 1999, fall while working for the respondent. Likewise, respondent agrees claimant is entitled to worker compensation benefits for this injury.

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On November 30, 1999, the date of the preliminary hearing, claimant had been employed by the respondent for 22 years. Eleven of those years he had been employed at the Fredonia, Kansas, plant. Respondent's Fredonia, Kansas, plant produces cement. At the time of claimant's alleged injuries, he was employed in production as a finishing helper. Claimant was required to perform repetitive work activities throughout the work day such as hammering, shoveling, jack hammering, running impact equipment, and doing various repair activities such as plumbing.

After claimant fell and injured his right arm on June 7, 1999, he continued to work and did not seek medical treatment for the right arm injury until August 3, 1999. Claimant testified his right arm pain did not go away and in fact worsened as he continued to work. He also started noticing a decrease in strength of his hands that caused him to drop his work tools.

For his continuing right arm problems, claimant went to the company physician, Ambrosio P. Mendiola, M.D. Claimant saw Dr. Mendiola on August 3, 1999, and on August 19, 1999, for both his right arm and left ankle complaints. On August 3, 1999, Dr. Mendiola diagnosed claimant with tendonitis of the right elbow. He placed claimant in physical therapy for both the right arm and left ankle injuries. But claimant testified he had to pay for the left ankle treatment because the respondent's insurance carrier refused to pay. Because claimant did not improve, Dr. Mendiola recommended to the respondent that claimant be seen an orthopedic physician. Dr. Mendiola told claimant to select an orthopedic physician from the phone book. Claimant selected Michael P. Estivo, M.D., located in Wichita, Kansas.

Claimant first saw Dr. Estivo on August 25, 1999. The doctor found claimant with left ankle and right upper extremity complaints. His diagnosis was right elbow pain, possible cubital tunnel syndrome, and left ankle sprain. He placed claimant's left ankle in an air cast splint, prescribed anti-inflammatory medication, and because claimant was having pain and paraesthesias in his right arm, ordered claimant to have a nerve conduction study.

Dr. Estivo saw claimant again on September 2, 1999. At that time, he had the results of the nerve conduction study that indicated carpal tunnel syndrome, bilaterally, greater on the right than the left. The doctor took claimant off work and prescribed physical therapy treatment for both claimant's left ankle and bilateral wrists for half of a day over two weeks.

Claimant took Dr. Estivo's off work slip, that indicated he needed physical therapy for two weeks, to the respondent on September 2, 1999. Claimant testified he met with two of respondent's management employees, Roger Serber and Horace Compton, concerning the loss of work because of his bilateral carpal tunnel syndrome condition and his left ankle sprain. Claimant admits he did not specifically notify either of these two management employees that his carpal tunnel syndrome was related to his work. But claimant testified both Mr. Serber and Mr. Compton expressed concern that claimant was taking off work because of those injuries. Claimant testified respondent had a bonus pay program for the plant employees if they did not lose work due to a work-related injury. In fact, during claimant's conversation with Mr. Compton and Mr. Serber, Mr. Compton suggested claimant take vacation while in the physical therapy program instead of losing time from work. But claimant testified he did not have enough vacation time to cover the two weeks of physical therapy.

Dr. Estivo's medical records were admitted into evidence and indicate that claimant did not improve in the physical therapy program. Because claimant continued to have right arm pain with decreasing grip strength and the nerve conductive studies showed moderate nerve entrapment on the right, Dr. Estivo recommended and scheduled a carpal tunnel surgical release on the right for September 28, 1999. Dr. Estivo's medical records then indicate the surgical release was canceled by respondent's insurance company.

Respondent argues that claimant failed to prove his bilateral carpal tunnel condition was related to his work activities. Furthermore, respondent contends Dr. Estivo's medical records do not indicate claimant's repetitive work activities caused the bilateral carpal tunnel syndrome condition. The Appeals Board disagrees and finds claimant has established through his testimony that he injured his right upper extremity in a June 7, 1999, fall at work. Claimant continued to work and noticed loss of strength in both hands as he preformed his repetitive work activities. The Appeals Board finds claimant has established, through his testimony and through the medical treatment records admitted into

evidence at the preliminary hearing, that his bilateral carpal tunnel syndrome condition is related to the work activities he performed for respondent.

In regard to the notice issue, the Appeals Board concludes respondent's managers' comments when claimant submitted to them Dr. Estivo's off work slip on September 2, 1999, indicate they knew claimant was claiming that both his bilateral carpal tunnel syndrome condition and his left ankle sprain were related to his employment. Both of these management employees were concerned that claimant was going to be absent from work because of work-related injuries which would affect the respondent's no lost time bonus program. Based on claimant's conversation with these two management employees, the Appeals Board finds the ten-day timely notice requirement was satisfied on September 2, 1999, when claimant submitted Dr. Estivo's off work slip to respondent's representatives. Further, claimant established, through his testimony, he continued to work for respondent through his last day worked of September 2, 1999, which the Appeals Board finds the appropriate date of accident for claimant's bilateral carpal tunnel syndrome condition.¹

WHEREFORE, it is the finding, decision, and order of the Appeals Board that Administrative Law Judge Jon L. Frobish's December 2, 1999, preliminary hearing Order should be, and is hereby, affirmed in all respects.

IT IS SO ORDERED.

Dated this ____ day of January 2000.

BOARD MEMBER

c: Dennis L. Phelps, Wichita, KS
Christopher J. McCurdy, Wichita, KS
Jon L. Frobish, Administrative Law Judge
Philip S. Harness, Director

¹ See Berry v. Boeing Military Airplanes, 20 Kan. App. 2d 220, 885 P.2d 1261 (1994).